

(4)
No. 95-5661

Supreme Court, U.S.

~~FILED~~

DEC 20 1995

CLERK

In The
Supreme Court of the United States

October Term, 1995

JUAN MELENDEZ,

vs.

Petitioner,

UNITED STATES,

Respondent.

On Writ Of Certiorari To The United States
Court Of Appeals For The Third Circuit

JOINT APPENDIX

DREW S. DAYS, III
Solicitor General of the
United States
U.S. Department of Justice
Washington, DC 20530
(202) 514-2217
Counsel for Respondent

PATRICK A. MULLIN
Counsel of Record
25 Main Street
Court Plaza North
Hackensack, NJ 07601
(201) 487-9282
Counsel for Petitioner

Of Counsel:

DAVID ZLOTNICK
1001 Pennsylvania
Avenue, N.W.
Suite 200 South
Washington, DC 20004
(202) 457-4204

PETER GOLDBERGER
The Ben Franklin
Suite 400
Chestnut Street at Ninth
Philadelphia, PA 19107
(215) 923-1300

Petition For Writ Of Certiorari Filed August 15, 1995
Writ Of Certiorari Granted November 6, 1995

TABLE OF CONTENTS

	Page
RELEVANT DOCKET ENTRIES	1
EXCERPT OF SENTENCING HEARING ADDRESS- ING DEPARTURE ISSUE	2
PLEA AGREEMENT DATED MAY 10, 1993	4
GOVERNMENT'S LETTER MOTION FOR DEPART- MENT DATED OCTOBER 7, 1993	13
JUDGMENT OF UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY, DATED NOVEMBER 29, 1993.....	15
OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT FILED MAY 22, 1995.....	22
JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT FILED MAY 22, 1995.....	39
ORDER DENYING REHEARING AND REHEARING EN BANC OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED JUNE 27, 1995	40
ORDER OF THE SUPREME COURT OF THE UNITED STATES GRANTING CERTIORARI AND LEAVE TO PROCEED IN FORMA PAUPERIS DATED NOVEMBER 6, 1995.....	42

RELEVANT UNITED STATES DISTRICT COURT
DOCKET ENTRIES
United States v. Melendez
Docket No. 92-713

<u>DATE</u>	<u>PROCEEDINGS</u>
12/22/92	Indictment Fld. 12-18-92
3/2/93	MOYA, MELENDEZ & POLANCO. Arraign- ment. All 3 defts. entered a plea of Not Guilty to the Ind. Ordered motions filed by 3/15/93, Govt. response by 4/5/93, motions ret. 4/26/93 and trial date 5/6/93. Ordered bail cont. Fld. 2/26/93 (Sarokin) (PL)
6/30/93	MOYA & MELENDEZ - Minutes of 6/23/93. Defts. retracted their pleas of Not Guilty and entered pleas of GUILTY to Ct. 1 of Ind. Ordered sentence date set for 9/8/93. Ordered defts remanded. Fld. 6/23/93 (Sarokin) (PL)
12/1/93	MELENDEZ - Minutes of 11/23/93. SEN- TENCE: 120 months. Impr. and 5 years supervised release. Deft. to cooperate w/INS re: status, etc; Spec. assessment \$50. Fld. 11-30-93 (Sarokin) (PL)
1/11/94	MELENDEZ - ORDER granting deft's motion for an extension of time to file a Notice of Appeal & granting the deft. per- mission to file a Notice of Appeal out of time, Fld. 1/10/94 (Sarokin)

IN THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF NEW JERSEY

UNITED STATES

v.

Case No. 92-713-02

JUAN MELENDEZ

EXCERPTS OF SENTENCING HEARING

* * *

MR. KATZ: Your Honor, I wanted to point out to the Court we reached a plea agreement with the prosecutor in New York with a three to nine-year sentence, and that would be the State sentence.

THE COURT: Thank you.

That is what I was going to address first.

I do not think that this Court at this juncture has the right to make the sentence to be imposed concurrent with a sentence that is not yet imposed, and I would suggest that that application be made to the State Court.

If it is rejected, I will certainly entertain an application after the fact to make this sentence concurrent without ruling on it. I obviously need to know what discretion, if any, the Court has in that type [sic] situation, so at this moment, the request to make this sentence concurrent with the State sentence to be imposed will be denied without prejudice.

The Court has considered the probation report, the allocution [sic] of counsel and defendants, as well as the correspondence that has been received on behalf of the

defendants, together with the statement and letter received by the Government.

As a result of the pleas in this matter, the defendants face a maximum punishment of ten years to life imprisonment, and the appropriate guideline range in each instance is 135 to 168 months.

The Government in each instance has made a motion for a downward departure, but as Mr. Rivas points out, there has been no motion to go below the statutory mandatory minimum pursuant to 18 USC 3553(e). Under those circumstances and under the present status of the law, the lowest sentence that the Court could impose is 120 months.

I accept the statements of remorse by the defendants. I am sure now they realize what they have done to themselves and to their families, and yet on the other hand, we have to also recognize what the Government has clearly articulate here today, that other families are very much affected by the sale of drugs.

Will the defendants please rise?

Pursuant to the Sentencing Reform Act of 1984 and granting the Government's motion for a downward departure, it is the judgment of the Court that each of the defendants is hereby committed to the custody of the Bureau of Prisons to be imprisoned for a term of 120. In each instance, I am honoring the request made by defense counsel.

Upon release from imprisonment, each defendant shall be placed on supervised release for a term of five years.

* * *

U.S. DEPARTMENT OF JUSTICE

J.A. 53

United States Attorney
District of New Jersey

Federal Building - Room 502 201/645-2700
970 Broad Street FTS/348-2700
Newark, New Jersey 07102

AR:mc
9206243

May 10, 1993

Robert P. Leighton, Esq
15 Park Row
New York, New York 10038

Re: Plea Agreement with Juan Melendez
Criminal No. 92-713

Dear Mr. Leighton:

This letter sets forth the full and complete agreement between Juan Melendez and the United States Attorney for the District of New Jersey. If the offer is not accepted and signed by the close of business on May 21, 1993, the offer will be withdrawn.

Charge

Conditioned on the understandings specified below, the United States will accept a guilty plea from Juan Melendez to count 1 of the Indictment, Criminal No. 92-713, which charges that Juan Melendez conspired with others to possess with the intent to distribute over 5

kilograms of cocaine, in violation of 21 U.S.C. § 846. If Juan Melendez enters a guilty plea and is sentenced on this charge, the United States Attorney for the District of New Jersey will not bring any further charges against Juan Melendez relating to the illegal possession and distribution of drugs between July 1, 1992 and December 31, 1992. This agreement not to prosecute further is limited to that criminal activity of which Juan Melendez has made this office aware as of the date of this agreement.

Cooperation

Juan Melendez shall truthfully disclose all information concerning all matters about which this Office inquires of him. Juan Melendez shall make himself available at all reasonable times requested by representatives of the Government and shall truthfully testify in the grand jury and at any trial as to any subject about which he is questioned. Furthermore, Juan Melendez agrees to provide to this Office upon request all documents and other materials that are relevant to the investigation and that are in Juan Melendez's possession or under his control.

Juan Melendez's cooperation includes participation in affirmative investigative techniques, including, where possible, making telephone calls and introductions of law enforcement officials to individuals about whom Juan Melendez has provided information concerning criminal activity. All such activity by Juan Melendez must be conducted only at the express direction and under the supervision of this Office and federal law enforcement personnel.

Should Juan Melendez withdraw from this agreement, or should Juan Melendez commit any federal, state, or local crime between the date of this agreement and his sentencing in this matter, or should it be established that Juan Melendez intentionally has given materially false, misleading, or incomplete testimony or information or otherwise has violated any provision of this agreement, this agreement and its benefits to Juan Melendez shall be null and void. Thereafter, Juan Melendez shall be subject to prosecution for any federal criminal violation of which this Office has knowledge, including but not limited to, perjury and obstruction of justice. Any such prosecution may be premised upon any information provided by Juan Melendez, and such information may be used against him.

Sentence and Other Penalties

The sentence to be imposed upon Juan Melendez is within the sole discretion of the sentencing judge, subject to the provisions of the Sentencing Reform Act, 18 U.S.C. §§ 3551-3742 and 28 U.S.C. §§ 991-998, and the United States Sentencing Guidelines. The sentencing judge may impose the maximum term of imprisonment and the maximum fine that are consistent with the Sentencing Reform Act and the Sentencing Guidelines, up to and including the statutory maximum term of imprisonment and the statutory maximum fine.

The violation of 21 U.S.C. § 846 charged in Count 1 of the Indictment carries a statutory mandatory minimum penalty of 10 years' imprisonment, a maximum penalty of

life years' imprisonment and a \$4,000,000.00 fine. Pursuant to 21 U.S.C. § 855, the sentencing judge may impose an alternative fine of twice the gross profits or other proceeds to Juan Melendez. The Sentencing Reform Act and the Sentencing Guidelines also may impose a minimum term of imprisonment and/or fine, and the Sentencing Guidelines may authorize departure from the minimum and maximum penalties under certain circumstances. All fines imposed by the sentencing court are subject to the payment of interest.

Further, in addition to imposing any other penalty on Juan Melendez, the sentencing judge: (1) will order Juan Melendez to pay an assessment of \$50 per count, pursuant to 18 U.S.C. § 3013; and (2) pursuant to 21 U.S.C. § 841, will require Juan Melendez to serve a term of supervised release of at least 5 years, which will begin at the expiration of any term of imprisonment imposed. Should Juan Melendez be placed on a term of supervised release and subsequently violate any of the conditions of supervised release before the expiration of its term, Juan Melendez may be sentenced to an additional term of imprisonment equal to all of the term of supervised release previously imposed, without credit for time previously served on post-release supervision and in addition to the statutory maximum term of imprisonment set forth above.

Stipulations

The United States and Juan Melendez agree to stipulate at sentencing to the statements set forth in the attached Schedule A, which hereby is made a part of this

plea agreement. This agreement to stipulate, however, cannot and does not bind the sentencing court, which may make independent factual findings and may reject any or all of the stipulations entered into by the parties. Moreover, this agreement to stipulate on the part of the United States is based on the information and evidence that this Office possesses as of the date of this plea agreement. Thus, if this Office obtains or receives additional evidence or information prior to sentencing that it determines to be credible and to be materially in conflict with any stipulation in the attached Schedule A, the United States shall not be bound by any such stipulation. A determination that any stipulation is not binding shall not release either the United States or Juan Melendez from any other portion of this plea agreement, including any other stipulation.

Rights and Obligations of U.S. Attorney's Office at Sentencing

The Office cannot and does not make any representation or promise as to what guideline range will be found applicable to Juan Melendez, or as to what sentence Juan Melendez ultimately will receive. This Office, however, does reserve its right to take a position with respect to the appropriate sentence to be imposed on Juan Melendez by the sentencing judge. In addition, this Office will inform the sentencing judge and the Probation Office of: (1) this agreement; (2) the nature and extent of Juan Melendez's activities and relevant conduct with respect to this case; (3) the full nature, extent, and significance of Juan Melendez's cooperation with this Office and when such cooperation commenced; and (4) all other information

relevant to sentencing, favorable or otherwise, in the possession of this Office.

Further, if Juan Melendez fully complies with this agreement and, prior to his sentencing, provides substantial assistance in the investigation or prosecution of one or more persons who have committed offenses, the United States: (1) will move the sentencing court, pursuant to Section 5K1.1 of the Sentencing Guidelines, to depart from the otherwise applicable guideline range; or (2) in the event that the sentencing court declines to depart from the applicable guideline range, will recommend that the sentencing court impose the minimum sentence required under the applicable guideline range.

The United States specifically reserves the right to correct factual misstatements relating to sentencing proceedings; to appeal Juan Melendez's sentence pursuant to 18 U.S.C. § 3742(b); and to oppose any appeal of his sentence by Juan Melendez pursuant to 18 U.S.C. § 3742(a).

Other Provisions

This agreement is limited to the United States Attorney's Office for the District of New Jersey and cannot bind other federal, state, or local prosecuting authorities. However, this Office will bring this agreement and the cooperation of Juan Melendez to the attention of other prosecuting offices, if requested to do so.

Finally, this agreement was reached without regard to any civil matters that may be pending against Juan Melendez, including, but not limited to, proceedings by

the Internal Revenue Service relating to potential civil tax liability.

This agreement constitutes the full and complete agreement between Juan Melendez and the United States Attorney for the District of New Jersey. No additional promises, agreements, or conditions have been entered into other than those set forth in this letter, and none will be entered into unless in writing and signed by all parties.

Very truly yours,

MICHAEL CHERTOFF
United States Attorney

By: /s/ Alberto Rivas
ALBERTO RIVAS
Assistant U.S. Attorney

APPROVED:

/s/ Illegible

I have received this letter from my attorney, Robert P. Leighton, Esq., and it has been translated to me into Spanish, and I understand it fully. I hereby acknowledge that it fully sets forth my agreement with the Office of the United States Attorney for the District of New Jersey. I state that there have been no additional promises or representations made to me by any officials or employees

of the United States Government or by my attorney in connection with this matter.

Juan Melendez

Witnessed by:

Robert P. Leighton, Esq.
Counsel for Juan Melendez

Date:

PLEA AGREEMENT WITH Juan Melendez

Schedule A

The United States and Juan Melendez agree to stipulate at sentencing to the statements set forth below, subject to the conditions in the attached plea agreement.

1. It is stipulated that If Juan Melendez continues to recognize and affirmatively accept personal responsibility for his criminal conduct he is entitled to a 2 point reduction in the overall offense level pursuant to § 3E1.1(a) of the Guidelines.

2. It is stipulated that pursuant to § 3E1.1(b)(1) of the Guidelines the defendant is entitled to an additional decrease of 1 level for timely notifying the authorities of his intention to enter a plea of guilty, so long as he continues to qualify for stipulation 1 above.

3. It is stipulated that pursuant to § 2D1.1(4) of the Sentencing Guidelines the applicable guideline range for this defendant is 50 to 150 kilograms of cocaine.

4. The government further agrees to recommend that any custodial sentence imposed by the Court be concurrent to any other sentence.

U.S. Department of Justice

*United States Attorney
District of New Jersey*

970 Broad Street, Room 502 201/645-2700
Newark, New Jersey 07102

October 7, 1993

Hon H. Lee Sarokin
United States District Judge
United States District Court
Federal Plaza
Newark, New Jersey 07102

RE: United States v. Edwin Moya
United States v. Juan Melendez
Criminal No. 92-713

Dear Judge Sarokin:

Please accept this letter in lieu of a formal brief in support of the motion of the United States to impose on defendants Moya and Melendez in the above-captioned matter a sentence lower than what the Court has determined to be the otherwise applicable under the sentencing guidelines. This motion is made pursuant to Section 5K1.1 of the United States Sentencing Guidelines and the written plea agreements dated May 10, 1993.

After learning of the cooperating plea agreement entered into by co-defendant Bienvenido Polanco, both defendants simultaneously agreed to change their pleas and entered into written plea agreements with the United States. As part of the agreements they agreed to be debriefed and disclose whatever information they had

regarding narcotic trafficking. The two defendants met with law enforcement representatives on at least 4 occasions where they answered all the questions posed to them.

Because of the assistance provided to this Office and the New York County District Attorney's Office and pursuant to the plea agreements entered into between the United States and Moya and Melendez, it is the position of the U.S. Attorney's Office for the District of New Jersey that defendants Moya and Melendez deserve a reduction of their sentences from the applicable minimum sentence under the Sentencing Guidelines.

MICHAEL CHERTOFF
UNITED STATES ATTORNEY

By: /s/ Alberto Rivas
ALBERTO RIVAS
Assistant U.S. Attorney

cc: Morton Katz, Esq.
Robert Leighton, Esq.
Carolyn McGovern-Wojcik, U.S.P.O.

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

UNITED STATES OF
AMERICA

VS.

JUAN MELENDEZ

JUDGMENT IN A
CRIMINAL CASE

(For Offenses Committed
On or After
November 1, 1987)

Case Number: 92-713-02

(Defendant's Name)

ROBERT P. LEIGHTON
Attorney's Name

THE DEFENDANT:

X plead guilty to count(s) one.
— was found guilty on count(s) _____ after a plea
of not guilty.

Accordingly, the defendant is adjudged guilty of
such count(s) which involve the following offenses:

<u>TITLE</u> <u>SECTION</u>	<u>NATURE OF</u> <u>OFFENSE</u>	<u>DATE OF</u> <u>OFFENSE</u>	<u>COUNTS</u>
21:841(a)	Conspiracy to possess with the intent to distribute cocaine	9/8/93	one

The defendant is sentenced as provided in pages 2
through 4 of this judgment. The sentence is imposed
pursuant to the Sentencing Reform Act of 1984.

___ The defendant has been found not guilty on counts ___ and is discharged as such count(s).

___ Count(s) ___ (is) (are) dismissed on the motion of the United States.

X It is ordered that the defendant shall pay a special assessment of \$50.00, for count(s) ___, which shall be due X immediately ___ as follows:

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by the judgment are fully paid.

Defendant's Soc. Sec. No.: 091-70-6510

Defendant's Date of Birth: 12/15/66

Defendant's Address:

8506 Liberty Ave.
North Bergen, NJ

November 23, 1993

Date of Imposition of Sentence

/s/ H. Lee Sarokin

Signature of Judicial Officer

Hon. H. Lee Sarokin

Name & Title of Judicial Officer

Date: 11/29/93

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of prisons to be imprisoned for a term of 120 months

___ The court makes the following recommendations to the Bureau of Prisons:

X The defendant is remanded to the custody of the United States Marshal.

___ The defendant shall surrender to the United States Marshal for this district.

___ at ___ a.m. on _____.

___ as notified by the United States Marshal.

___ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons,

___ before a.m./p.m. on _____.

___ as notified by the United States Marshal.

___ as notified by the probation office.

RETURN

I have executed this judgment as follows:

Defendant delivered on ___ to _____, with a certified copy of this judgment.

United States Marshal

By _____
Deputy Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 5 years.

While on supervised release, the defendant shall not commit another federal, state, or local crime and shall not illegally possess a controlled substance. The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). If this judgment imposes a restitution obligation, it shall be a conditions [sic] of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

X The defendant shall report in person to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

___ The defendant shall pay any fines that remain unpaid at the commencement of the term of supervised release.

___ The defendant shall not possess a firearm or destructive device.

The defendant shall cooperated with the Immigration and Naturalization service to resolve any problems with his status in the United States. The defendant shall provide truthful information and abide by the rules and regulations of the Immigration and Naturalization Service. If deported, the defendant shall not reenter the United

States without written permission of the Attorney General. If the [sic] reenters the U.S., he shall report in person to the nearest U.S. Probation Office within 48 hours.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this judgment, the defendant shall not commit another federal, state or local crime. In addition:

- 1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
- 2) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within first five days of each month;
- 3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
- 4) the defendant shall support his or her dependents and meet other family responsibilities;
- 5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;
- 6) the defendant shall notify the probation officer with [sic] 72 hours of change in residence or employment;
- 7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any persons convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrest [sic] or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record of personal history of characteristics, and shall permit probation officer to make such notification and to confirm the defendant's compliance with such notification requirement.

STATEMENT OF REASONS

X The court adopts the factual findings and guideline application in the presentence report.

OR

— The court adopts the factual findings and guideline application in the presentence report except (see attachment, if necessary):

Guideline Range Determined by the Court:

Total Offense Level: 33

Criminal History Category: I

Imprisonment Range: 135 to 168 months

Supervised Release Range: to 5 years

Fine Range: \$17,500 to \$4,000,000

X Fine is waived or is below the guideline range, because of the defendant's inability to pay.

Restitution: \$ N/A

— Full restitution is not ordered for the following reason(s):

— The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by the application of the guidelines.

OR

— The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reason(s):

OR

The sentence departs from the guideline range

X upon motion of the government, as a result of defendant's substantial assistance.

— for the following reason(s):

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 93-5755

UNITED STATES OF AMERICA

v.

JUAN MELENDEZ

Appellant

On Appeal From the United States District Court
For the District of New Jersey
(D.C. Crim. Action No. 92-cr-00713-2)

Argued February 16, 1995

BEFORE: STAPLETON and COWEN, *Circuit Judges*, and
HUYETT, *District Judge**

(Opinion Filed May 22, 1995)

OPINION OF THE COURT

STAPLETON, *Circuit Judge*:

Juan Melendez appeals his sentence. The first issue presented concerns a district court's authority to depart downward from a statutory minimum sentence based

*Honorable Daniel H. Huyett, 3rd, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

upon the defendant's substantial assistance with a criminal investigation where the government has moved under USSG §5K1.1 for a departure below the U.S. Sentencing Guideline range but has not moved under 18 U.S.C. § 3553(e) for a departure below the statutory minimum. We hold that, under such circumstances, a district court's authority under §5K1.1 to depart below the Sentencing Guideline range does not permit it to depart below a lower minimum sentence set by statute. The second issue concerns Melendez's motion for a downward departure pursuant to application note 17 to USSG §2D1.1. We agree with the district court that §2D1.1 application note 17 does not permit a district court to depart downward from a statutory minimum sentence. The final issue concerns Melendez's contention that the district court should have permitted him to withdraw his guilty plea. The record establishes that Melendez in fact did not attempt to withdraw his plea before the district court.

I.

Melendez and codefendant Edwin Moya were approached by confidential informants of the United States Customs Service posing as importers and transporters of cocaine. This initial contact led to several meetings, during which Melendez, Moya, and the confidential informants discussed the availability of cocaine for distribution. The discussions culminated in a meeting during which Melendez and Moya gave the confidential informants \$10,000 as a deposit toward the transportation expenses for 24 kilograms of cocaine. The next day, the two codefendants deposited an additional \$2500 for the transportation of the cocaine.

Shortly thereafter, Moya and Melendez were arrested by New York authorities on unrelated drug charges. After their arrest, Moya's common law wife, Anna Maria Ferrara, her brother Raphael Ferrara, and her uncle Bienvenido Polanco, held further negotiations with the confidential informants for a 225-kilogram cocaine purchase. Government agents ultimately made a controlled delivery of 30 kilograms of cocaine to Raphael Ferrara and Polanco. Raphael Ferrara and Polanco were arrested shortly after taking possession of the drugs and Anna Maria Ferrara was arrested on the following day.

Melendez was charged with conspiring, in violation of 21 U.S.C. § 846, to distribute and to possess with intent to distribute more than five kilograms of cocaine, a crime that carries a statutory minimum sentence of 10 years' imprisonment. 21 U.S.C. § 841(b)(1)(A). He originally pleaded not guilty. Plea negotiations ensued, however, and Melendez ultimately signed a cooperating plea agreement. The agreement provided, in pertinent part, that in return for Melendez's cooperation with the government's investigation and his pleading guilty, the government would move for a downward departure from the applicable Guideline range pursuant to USSG §5K1.1. The agreement did not require the government to file a § 3553(e) motion to depart below the statutory minimum, however. Melendez retracted his plea of not guilty and pleaded guilty to the charged conspiracy.

The probation officer determined that the Guideline sentencing range applicable to Melendez's crime was 135 to 168 months. The government, in accordance with the agreement, moved for a downward departure from that Guideline range, pursuant to §5K1.1, in recognition of

Melendez's substantial assistance in the investigation or prosecution of another person. The district judge granted that motion, and departed downward from the sentencing range set by the Guidelines. However, because the government had not also moved pursuant to § 3553(e), the judge ruled that he had no authority to depart below the statutory minimum and meted out the 10-year minimum sentence required by statute. Melendez maintains that this was error. He argues that a §5K1.1 motion not only triggers the court's authority to depart downward from the sentencing level set by the Guidelines but also triggers the court's authority to depart below a lower, statutory minimum.

II.

The government maintains that Melendez waived or forfeited his right to appeal this issue, claiming that Melendez never formally argued to the district court that the government's §5K1.1 departure motion empowered the court to depart below the 10-year statutory minimum. To preserve the right to appeal a district court ruling, "it is sufficient that a party, at the time the ruling . . . is made or sought, makes known to the court the action which that party desires the court to take . . . and the grounds therefor." Fed.R.Crim.P. 51. Moreover, "[t]he general rule requiring counsel to make clear to the trial court what action they wish taken should not be applied in a ritualistic fashion. If the problem has been brought to the attention of the court, and the court has indicated in no uncertain terms what its views are, to require an objection would exalt form over substance." 3A Charles A. Wright, *Federal Practice & Procedure* § 842, 289-90 (1982 & Supp.

1994); see also *Government of Virgin Islands v. Joseph*, 964 F.2d 1380, 1384-85 (3d Cir. 1992) (rejecting the government's contention that an issue was not preserved for appeal because the court had been made aware of the issue and because a contemporaneous objection would not have further aided the district court); cf. *United States v. 57.09 Acres of Land*, 757 F.2d 1025, 1027 (9th Cir. 1985) (noting that the government did not waive its right to object to jury instructions because the court had been made "aware of the government's objection"); *Bass v. Department of Agriculture*, 737 F.2d 1408, 1413 (5th Cir. 1984) (noting the established rule in civil cases "that formal objection is not necessary if the trial judge was fairly apprised of the nature of the objection").

Our review of the record reveals that Melendez in fact "[made] known to the court the action which [he] desire[d] the court to take." As the Assistant United States Attorney admitted during the sentencing hearing: "Both defendants through counsel have argued that the Court depart downward from this mandatory minimum." (App. at 24a.) Moreover, the district court was made well aware of the underlying legal debate over whether a §5K1.1 motion permits a district court to depart below a statutory minimum. The government admitted during the sentencing hearing that "[s]ome arguments indicate that the law doesn't require the Court to impose the mandatory minimum." (App. at 24a.) Most importantly, the district court clearly understood that Melendez was asserting these arguments; it expressly addressed and resolved the issue of the court's authority to depart below the statutory minimum. In this context, there was no need for Melendez to take the additional step of repackaging

the government's statement as his own formal objection to preserve his right to appeal. Any such requirement would elevate form over substance. Thus, we conclude that this issue is properly preserved for appeal and we will proceed to the merits of Melendez's argument.

III.

Congress has decreed that a person who distributes, or conspires to distribute, five kilograms or more of cocaine "shall be sentenced to a term of imprisonment which may not be less than 10 years." 21 U.S.C. § 841(b)(1)(A). This statute represents a Congressional judgment about the seriousness of this offense and the degree of sanction necessary to punish and deter this kind of conduct.

At the same time, Congress has recognized that the value to society of the cooperation of an individual charged with this kind of offense can, under some circumstances, outweigh the benefit to be derived from imposing the statutory minimum sentence. Accordingly, Congress has authorized sentences below this and other statutory minima. Section 3553(e) of Title 18 provides:

(e) Limited authority to impose a sentence below a statutory minimum. – Upon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as a minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense. Such sentence shall be imposed in accordance with the guidelines and policy statements issued by the

Sentencing Commission pursuant to section 994 of title 28, United States Code.

Notably, Congress has authorized sentences below a statutory minimum only upon the prosecution's motion; that is, before a court may depart below a statutory minimum, the prosecutor first must determine that the value of the cooperation is sufficiently great to warrant overriding Congress's judgment concerning the minimum appropriate sentence. By requiring a government motion, Congress thus gave the prosecutor the sole key that affords access to a sentence below a statutory minimum. *Wade v. United States*, 112 S.Ct. 1840, 1843 (1992).

That the prosecutor holds the sole key to the area below the statutory minimum does not mean that the sentencing court, once the prosecutor has made a § 3553(e) motion, has unbridled discretion to set a defendant's sentence, however. As the final sentence of § 3553(e) reflects, Congress contemplated that the limited downward departure authority there bestowed on a sentencing court would be exercised in the context of, and in a manner consistent with, a system of Guidelines sentencing that was being constructed at the time of the passage of § 3553(e). Consistent with this approach, § 994(n) of Title 28 of the Sentencing Reform Act of 1984 directs the Sentencing Commission to formulate Guidelines that will reflect the general appropriateness of rewarding cooperation with sentences lower than they would otherwise be, including sentences below a statutory minimum. Section 994(n) of Title 28 provides in pertinent part:

The [Sentencing] Commission shall assure that the guidelines reflect the general appropriateness of imposing a lower sentence than would

otherwise be imposed, including a sentence that is lower than that established by statute as a minimum sentence, to take into account a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense.

Although § 994(n) directs recognition of the principle that a lower sentence for cooperation can be appropriate, it says nothing about a process for identifying particular cases in which such a sentence may be appropriate. Accordingly, nothing in the text of § 994(n) suggests that Congress intended by the passage of § 994(n) to take back the access key given to the prosecutor in § 3553(e). The same can be said for the legislative history of § 994(n). The most one can argue, from Melendez's perspective, is that § 994(n) *may authorize the Commission* to take back that key. The text of § 994(n) does not seem to us to require that reading, however, and the legislative history provides no evidence of such an intent on the part of Congress.

Under § 994(n), the principle that a lower sentence for cooperation may be appropriate applies as well to sentences established by the Guidelines. Here also § 994(n) says nothing about how particular cases appropriate for such sentences will be identified. Thus, nothing in § 994(n) requires the Commission to give the prosecutor an exclusive access key to sentences *below the Guideline range* in return for cooperation.

The Commission exercised the authority given to it in this area by promulgating USSG §5K1.1. That Guideline and its first application note provide in relevant part:

**§5K1.1. Substantial Assistance to Authorities
(Policy Statement)**

Upon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense, the court may depart from the guidelines.

* * *

Application Notes:

1. Under circumstances set forth in 18 U.S.C. § 3553(e) and 28 U.S.C. § 994(n), as amended, substantial assistance in the investigation or prosecution of another person who has committed an offense may justify a sentence below a statutorily required minimum sentence.

There are two things about this action of the Commission that seem to us important in the current context. The first is that the sole authority granted in §5K1.1 is for departures "from the guidelines." Given the express reference in the application note to statutes authorizing departures "below a statutorily required minimum sentence," we believe this limitation must represent an advertent decision on the part of the Commission to provide authority in the Guidelines only for departures below the Guideline range, leaving departures below statutory minima to the authority conferred by § 3553(e).¹

¹ Where a statutory minimum is above the Guideline range, it becomes "the guideline sentence." USSG §5G1.1(b). We do not suggest that two motions are required in such circumstances. A motion under either § 3553(e) or §5K1.1 will suffice to demonstrate that the requisite exercise of prosecutorial discretion has occurred.

Second, §5K1.1 reflects a policy decision on the part of the Commission to give the prosecutor a veto power over departures below the Guideline range based on cooperation. The Commission thus recognized the value of letting the prosecutor's discretion control access to the area between the applicable Guideline range and any applicable, lower statutory minimum, just as § 3553(e) allows that discretion to control access to the area below a statutory minimum.

With this background, we turn to Melendez's argument. He must first ask us to conclude that Congress in § 944(n) authorized the Commission to take back the access key granted to the prosecutor in § 3553(e). While we question this proposition, we may accept it *arguendo* here. Melendez next insists that the Commission, while recognizing the value of allowing the prosecutor to control access to departures for cooperation below the Guideline range, created a system under which he or she can grant access to the area between the Guideline range and a lower statutory minimum only by surrendering his or her access control to the area below the statutory minimum. Melendez tenders no persuasive reason, however, why the Commission might have chosen to create such a seemingly incongruent system.

The root issue for decision here is whether the prosecutor in a given case will be able to grant access to a Guideline departure for cooperation and at the same time retain control of access to a departure from a lower, statutory minimum. A literal reading of §5K1.1 would indicate that a prosecutor has this option. This conclusion is consistent as well with the Congressional judgment reflected in § 3553(e). Moreover, no policy considerations

appear to counsel against this conclusion and a number counsel in favor. Indeed, beyond this case, a denial of this option for the prosecution would appear to be in no one's best interest. As Judge Easterbrook observed in his dissent in *United States v. Wills*, 35 F.3d 1192, 1198 (7th Cir. 1994):

Section 3553(e) and Guideline 5K1.1 permit a prosecutor to offer a reward for assistance. This process works best if the amount of the reward can be graduated to the value of the assistance – a value the prosecutor (who sees the full menu of crimes and potential cases in the district) can assess better than a judge. . . . [H]olding that a motion under either § 3553(e) or § 5K1.1 permits the judge to give any sentence he deems appropriate [will curtail] the prosecutor's ability to match the reward to the assistance. When cooperation can be procured for a modest reduction, a lower sentence overcompensates the defendant, at the expense of the deterrence force of the criminal law. Another consequence is that there will be fewer motions of any kind. If filing a motion under § 5K1.1 permits the judge to cut the sentence by three-quarters (as happened here), the prosecutor will insist on a great deal of assistance. Many defendants are unlucky enough to have little of value to offer. . . . They are now condemned to serve the full authorized sentence, even though a prosecutor possessed of power to differentiate might reward slight aid with a slight reduction.

We hold that a motion under USSG §5K1.1 unaccompanied by a motion under 18 U.S.C. § 3553(e) does not

authorize a sentencing court to impose a sentence lower than a statutory minimum.²

IV.

Melendez next argues that the government's confidential informants offered to sell him cocaine at prices substantially below market price, thereby leading him to purchase a significantly greater quantity of cocaine than he ordinarily would have been able to purchase given his available funds. He maintains further that the \$12,500 he had available for the drug deal would have enabled him to purchase, on the open market, only between one-half and three-quarters of a kilogram of cocaine instead of the more than 50 kilograms attributed to him by the district court. These facts, he contends, mandate a downward departure under application note 17 to USSG §2D1.1.³

² In so concluding, we join the Court of Appeals for the Eighth Circuit. *United States v. Rodriguez-Morales*, 958 F.2d 1441 (8th Cir. 1992). We respectfully disagree with the other courts of appeals that have addressed the same issue. *United States v. Wills*, 35 F.3d 1192 (7th Cir. 1994); *United States v. Beckett*, 996 F.2d 70 (5th Cir. 1993); *United States v. Cheng Ah-Kai*, 951 F.2d 490 (2d Cir. 1991); *United States v. Keene*, 933 F.2d 711 (9th Cir. 1991). We note our accord with the thoughtful dissents in *Wills* and *Keene*.

³ Application note 17 states:

If, in a reverse sting (an operation in which a government agent sells or negotiates to sell a controlled substance to a defendant), the court finds that the government agent set a price for the controlled substance that was substantially below the market value of the controlled substance, thereby leading to the defendant's purchase of a significantly greater quantity of the controlled substance

Melendez is not in a position to make these arguments, however. In his plea agreement, he specifically stipulated that his applicable Guideline range was 50 kilograms to 150 kilograms of cocaine. Moreover, the probation report determined that the applicable quantity of cocaine to be 75 kilograms and neither Melendez's objections to the presentence report nor his sentencing letter to the district court requested that less than five kilograms should be attributed to him. We accordingly conclude that the district court properly attributed more than five kilograms of cocaine to Melendez.

Having determined that the district court properly attributed in excess of five kilograms of cocaine to Melendez, the district court then was constrained to impose the statutory minimum sentence of 10 years' imprisonment. *See, e.g., United States v. DeMaio*, 28 F.3d 588, 591 (7th Cir. 1994) (holding that a sentencing court may not depart below a statutory minimum on any ground other than substantial assistance to criminal investigation); *United States v. Rudolph*, 970 F.2d 467, 470 (8th Cir. 1992) (holding that defendant's diminished capacity, while grounds for departure from the Guidelines sentencing range, is not grounds for departure below the minimum sentence set by Congress), *cert. denied*, 113 S. Ct. 1023 (1993); *United States v. Valente*, 961 F.2d 133, 135 (9th Cir. 1992) (holding that defendant's

than his available resources would have allowed him to purchase except for the artificially low price set by the government agent, a downward departure may be warranted.

aberrant behavior will not justify a departure below a statutory minimum).

V.

Finally, Melendez argues that the district court should have given him an opportunity to withdraw his guilty plea once he learned that the government did not intend to recommend a sentence below the 10-year statutory minimum. This issue also was not properly preserved for appeal. Although Melendez, in a brief filed *pro se*, maintains that he expressed his desire to withdraw his plea both in conversations with his attorney and in a letter to the court, nothing in the docket sheet or the record before this court supports those claims. Moreover, Melendez failed to express his alleged desire to withdraw his plea when he addressed the court at his sentencing. Because Melendez failed to raise this issue before the district court, we cannot address it here. *See, e.g., United States v. Johnson*, 359 F.2d 845, 846 (3d Cir. 1966) (noting that questions cannot be presented on appeal that have not first been determined by the district court).

VI.

We will affirm the judgment of the district court.

HUYETT, District Judge, dissenting:

I join in Parts I, II, and V of the majority opinion, and respectfully dissent with respect to Parts III, IV, and VI. Although the issue is a close one, I believe the majority has erred in holding that when a sentencing court grants a USSG § 5K1.1 motion to depart below the guideline

sentence, the court may not impose a sentence below the statutory minimum unless the § 5K1.1 motion is accompanied by a motion under 18 U.S.C. § 3553(e). I believe the court should follow the position accepted in the majority of circuits that have considered this issue. See *United States v. Wills*, 35 F.3d 1192 (7th Cir. 1994); *United States v. Beckett*, 996 F.2d 70 (5th Cir. 1993); *United States v. Cheng Ah-Kai*, 951 F.2d 490 (2d Cir. 1991); *United States v. Keene*, 933 F.2d 711 (9th Cir. 1991). But see *United States v. Rodriguez-Morales*, 958 F.2d 1441 (8th Cir.), cert. denied, ___ U.S. ___, 113 S. Ct. 375, 121 L. Ed.2d 287 (1992).

The majority correctly reasons that 18 U.S.C. § 3553(e) and 28 U.S.C. § 994(n) are silent with respect to whether the prosecutor should be given exclusive access to sentences below the Guideline ranges. I believe the majority errs, however, in determining that § 5K1.1 reflects the Sentencing Commission's advertent decision to give the prosecutor a veto over departures below the Guideline ranges and to leave departures below the statutory minima to the authority conferred by § 3553(e).

A careful reading of the sentencing guidelines and its commentary leads to an opposite conclusion. Guideline commentary "that interprets or explains a guideline is authoritative unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, that guideline." *Stinson v. United States*, ___ U.S. ___, 113 S. Ct. 1913, 1915, 123 L. Ed.2d 598 (1993). With this direction in mind, I believe the court should give more careful consideration to the commentary to the guidelines.

Section 5K1.1 must be read together with application note 1 which reads:

Under circumstances set forth in 18 U.S.C. § 3553(e) and 28 U.S.C. § 994(n), as amended, substantial assistance in the investigation or prosecution of another person who has committed an offense may justify a sentence below a statutorily required minimum sentence.

USSG § 5K1.1 comment. (n.1). I believe this note expresses the Sentencing Commission's intent that § 5K1.1 serve as a "conduit" for the application of § 3553(e), see *Cheng Ah-Kai*, 951 F.2d at 493, and not an attempt to create two separate motions concerning substantial assistance. Application Note 7 to USSG § 2D1.1, the guideline concerning drug offenses, further supports this interpretation and reads as follows:

Where a mandatory (statutory) minimum sentence applies, this mandatory minimum sentence may be "waived" and a lower sentence imposed (including a sentence below the applicable guideline range), as provided in 28 U.S.C. § 994(n), by reason of a defendant's "substantial assistance in the investigation or prosecution of another person who has committed an offense." See § 5K1.1 (Substantial Assistance to Authorities).

USSG § 2D1.1 comment. (n.7). The reference to § 5K1.1 rather than to § 3553(e) illustrates the Commission's determination that departures from the statutory minimum sentence are a mere subset of departures from the guidelines. This cross referencing, along with the substantial cross referencing between § 5K1.1, § 3553(e), and

§ 994(n) supports the conclusion that the district court has discretion. *See Keene*, 933 F.2d at 714.

I also disagree with the majority's view that "no policy considerations appear to counsel against this conclusion and a number counsel in favor" of its conclusion. Majority Op. at 135. Other circuits have ably raised policy considerations that counsel against the majority's position. The Ninth Circuit, for example, reasoned that with regard to the powers conferred on the government by § 5K1.1 and § 3553(e), "[o]nce the motion is made by the government, a transfer of discretion regarding the range of departure could well frustrate Congress' goal of eliminating sentencing disparity given the absence of appellate review over the prosecutor's activity." *Keene*, 933 F.2d at 715. In addition, an interpretation that provides two separate and distinct types of departure "would lead to a usurpation of the discretion of the district court." *Cheng Ah-Kai*, 951 F.2d at 494.

Although permitting the judge to depart below the guidelines or the statutory minimum on the basis of a § 3553(e) or § 5K1.1 motion curtails the prosecutor's ability to match the reward to the assistance, the defendant's sentence will still reflect his cooperation. Judges are quite capable of making this determination and should be permitted to exercise their sound discretion. *See id.*; *Keene*, 933 F.2d at 714.

I would vacate the sentence imposed by the district court and remand this case for resentencing. Therefore, I dissent.

UNITED STATES COURT OF APPEALS FOR THE
THIRD CIRCUIT

No. 93-5755

UNITED STATES OF AMERICA

v.

JUAN MELENDEZ, Appellant

On Appeal From the United States District Court
For the District of New Jersey
(D.C. Crim. No. 92-00713-2)

Present: STAPLETON and COWEN, *Circuit Judges*,
and HUYETT, *District Judge**

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel on February 16, 1995.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered December 1, 1993, be, and the same is hereby affirmed. All of the above in accordance with the opinion of this Court.

ATTEST:
/s/ Illegible
Clerk

Dated: May 22, 1995

* Honorable Daniel H. Huyett, 3rd, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 93-5755

UNITED STATES OF AMERICA

v.

JUAN MELENDEZ,

Appellant

SUR PETITION FOR REHEARING

*BEFORE: SLOVITER, Chief Judge, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, NYGAARD, ROTH, LEWIS, and McKEE, Circuit Judges, and HUYETT, District Judge**

The petition for rehearing filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

* Honorable Daniel H. Huyett, 3rd, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

Judges Becker, Hutchinson, Scirica, Nygaard, Roth, and McKee would grant rehearing.

By the Court,

/s/ Walter K. Stapleton
Circuit Judge

Dated: JUN 27 1995

SUPREME COURT OF THE UNITED STATES

No. 95-5661

Juan Meleandez [sic],

Petitioner

v.

United States

ON PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Third Circuit.

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

November 6, 1995
